Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

____ Term, 1978

NO. 78-202

CHARLES A. DEASON, JR.,

Petitioner

vs.

UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
NEW MEXICO,

Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE
COURT OF APPEALS FOR THE TENTH CIRCUIT

Fred J. Morton
1604 State National
Plaza
El Paso, Texas 79901

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Petitioner, CHARLES A. DEASON, Jr., prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit decided on April 14, 1978, in the case of CHARLES A. DEASON, JR. v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, which judgment dismissed Petitioner's appeal for want of a substantial Federal question.

OPINIONS BELOW

The Court of Appeals for the Tenth Circuit has issued an opinion in this case, a copy of which appears in Appendix "A" to this Petition. The case is reported at 574 F.2d 504(10th Cir. 1978).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c).

QUESTIONS PRESENTED

1. Whether the Federal District Court in New Mexico can constitutionally deny an attorney licensed to practice in New Mexico admission to practice solely on the basis that the attorney is not a New Mexico resident at the time he makes application for admission to practice in the Federal Court?

2. Whether, upon removal of a case from a New Mexico state District Court to the Federal District Court in New Mexico, the Federal District Court can compel an attorney licensed to practice in New Mexico to either dismiss his case originally filed in the state court or to employ federally admitted local counsel, solely because the attorney is a non-resident of the State of New Mexico?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION

1. ARTICLE IV, Section 2, Clause 1 of the United States Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

2. AMENDMENT FIVE to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . ."

3. AMENDMENT FOURTEEN, Section 1 to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall deprive any State, deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. FEDERAL LEGISLATION

1. Rule 4(f) of the Federal Rules of Civil Procedure provides:

> "All process other than a subpoena may be served anywhere within the territorial limits of the State in which the District Court is held, and, when authorized by a statute of the United States or by these Rules, beyond the territorial limits of that State. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross claim therein pursuant to Rule 19, may be served in the manner stated in Paragraphs (1)-(6) of Subdivision (d) of this Rule at all times outside the State but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same place. A subpoena may be served within the territorial limits provided by Rule 45."

2. Rule 45(e)(1) of the Federal Rules of Civil Procedure provides:

> "At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the Clerk of the District Court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena . . ."

C. LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

1. Rule 3b of the Local Rules of the United States District Court for the District of New Mexico provides:

> "Any attorney, who at any time of application is a resident of the State of New Mexico and who is a member of good standing of the Bar of the Supreme Court of New Mexico, may apply to practice before this Court upon completion of the designated written application form, payment of the $10.00 admission fee to the Clerk of the Court, and the taking of the prescribed oath."

STATEMENT OF THE CASE

The Petitioner is an attorney who has been admitted to practice in the States of

New Mexico and Texas. He is a member in good standing of the New Mexico Bar, being licensed in New Mexico on January 15, 1973. At the time of admission to the New Mexico Bar, the Petitioner had satisfied all the necessary state court residency requirements. The Petitioner is a resident of the State of Texas, residing approximately 2 miles from the border which separates Texas and New Mexico. The Petitioner has practiced law in the state courts of both states.

On March 11, 1977, the Petitioner filed, on behalf of Texas personal injury clients, a Complaint in the District Court of Dona Ana County, New Mexico. On April 29, 1977, Defendant, Fortuna Properties, Inc., filed a Petition for Removal of the Cause to the Federal District Court in New Mexico, the removal being based upon diversity of citizenship jurisdiction. The Petitioner filed his application for admission to practice before the United States District Court together with all documentation requested of him by the Committee on Admissions, which documentation indicated that the Petitioner was not a resident of the State of New Mexico.

In an Order dated July 6, 1977, the Honorable H. Vearle Payne, United States District Judge for the District of New Mexico, denied the Petitioner's application for admission to practice before the Federal District Court in New Mexico. Said Order was appealed to the Court of Appeals for the Tenth Circuit, which Court dismissed the appeal, concluding that the rule requiring residency before admission to practice before the United States District Court does not give rise to a substantial federal question.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has had before it numerous cases involving durational residency and citizenship requirements, which have often been invalidated under the "compelling state interest" test or the "strict scrutiny" rule and have been found to be violative of equal protection or privileges and immunities, or both. Both the "compelling state interest" test and the "strict scrutiny" rule have been fashioned and developed by this Court in the intervening years since this Court last wrote in the area of the validity of court rules requiring therein without associating local counsel, which this Court addressed in 1961 in Martin v. Walton, 368 U.S. 25. Since then the Court has given expanded recognition of the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969) and has specifically ruled that citizenship is an unconstitutional requirement for admission to practice law, IN RE Griffiths, 413 U.S. 717 (1973). In seven states and the District of Columbia there is no residency requirement whatsoever for individuals seeking initial admission to the bar of those states.

In judging whether or not there was any compelling governmental interest to warrant Petitioner's being a resident of New Mexico, where he has been licensed to practice for over four years, in order to a member of the Federal Bar, the opinion of the U. S. Court of Appeals for the Tenth Circuit below overlooked the fact and did not mention that Petitioner was a resident of El Paso County, Texas, residing approximately 2 miles from the New Mexico-Texas border, and approximately 44 miles from

Las Cruces, New Mexico, where the U. S. District Court for the District of New Mexico sits frequently, and failed to discuss the fact that Rule 4 and 45 of the Federal Rules of Civil Procedure give the U.S. District Court for the District of New Mexico control over parties (and attorneys) residing within 100 miles of the place in which any action is brought, even though it may be beyond the state's boundaries. Rule 4 specifically gives Federal Judges civil contempt powers over individuals residing within said 100 miles. In view of the fact that Petitioner had filed the civil action in the State District Court in the same county in New Mexico where the Federal District Court sits, and to which Federal Court the cause was removed on grounds of diversity of citizenship, the denial of Petitioner's Application for Admission to Practice before the U.S. District Court for the District of New Mexico solely on the basis of his non-residency is totally unnecessary in light of the fact that the Federal Court in which case is now pending has greater control over and access to Petitioner as attorney of record than did the State Court in which Petitioner filed the action and would have been entitled to pursue it without associating local counsel, despite his non-residency.

CONCLUSION

It is submitted that the instant case presents substantial and significant questions involving the power of a Federal District Court to exclude non-resident attorneys, over whom they have control because of their residence within less than 100 miles from the site of where the Federal District Court sits. These issues

have not been addressed by this Court but need to be resolved and clarified for all Federal District Courts throughout the entire Federal system.

Respectfully submitted,

CALHOUN, MORTON, DEASON
& PRESLAR
1604 State National Plaza
El Paso, Texas 79901

By _____
Fred J. Morton
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Fred J. Morton, Attorney for Petitioner and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of July, 1978, I served a true and correct copy of the foregoing Petition for Writ of Certiorari upon Respondent, U. S. District Court for the District of New Mexico by mailing three copies thereof in a properly addressed envelope with postage prepaid to Ruth C. Streeter, Assistant U. S. Attorney, P.O. Box 607, Albuquerque, New Mexico 87103.

_____
Fred J. Morton
Attorney for Petitioner
1604 State National Plaza
El Paso, Texas 79901

APPENDIX "A"

CHARLES A. DEASON, JR., Appellant,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, Appellee.

No. 77-1635.

United States Court of Appeals,

Tenth Circuit.

Submitted Nov. 22, 1977.

Decided April 14, 1978.

Charles A. Deason, Jr., of Calhoun, Morton, Deason & Preslar, El Paso, Texas, pro se.

Victor R. Ortega, U. S. Atty., Ruth C. Streeter, Asst. U. S. Atty, Albuquerque, N. M., for appellee.

Before SETH, Chief Judge, and LEWIS and McWILLIAMS, Circuit Judges.

PER CURIAM.

This is an appeal from an order of the Chief Judge of United States District Court of the District of New Mexico which denied appellant, Charles A. Deason, Jr.,

an attorney, admission to practice before that court. Mr. Deason was denied admission on the basis of his failure to meet the residency requirements prescribed in the local rules of the court. The Committee on Admissions of the court had recommended that the application for admission be denied.

The sole issue on appeal is whether the residency requirement of the United States District Court of New Mexico violates the appellant's constitutional right to interstate travel. We conclude that this appeal should be dismissed for want of a substantial federal question.

The appellant is an attorney who has been admitted to practice in the States of New Mexico and Texas. He is a member in good standing of the New Mexico Bar being licensed in New Mexico on January 15, 1973. At the time of admission to the New Mexico Bar appellant had satisfied all the necessary state court residency requirements which are not in question here. The appellant is a resident of the State of Texas, and has practiced law in the state courts of both states. On March 11, 1977, appellant, on behalf of Texas personal injury clients, filed a complaint in the district court of Dona Ana County, New Mexico. On April 29, 1977, defendant, Fortuna Properties, Inc., filed a petition for removal of the cause to federal district court in New Mexico based upon diversity jurisdictional grounds. Appellant Deason filed his application for admission to practice before the United States District Court together with documentation requested of him by the Committee on

Admissions. The supplemental material submitted to the Admissions Committee indicated that Mr. Deason was not a resident of the State of New Mexico but was a resident of Texas.

The rule in question, Rule 3b of the local rules of the United States District Court, District of New Mexico, provides:

> "b. Eligibility for Membership. Any attorney, who at the time of application, is a resident of the state of New Mexico and who is a member in good standing of the bar of the Supreme Court of New Mexico, may apply to practice before this Court upon completion of the designated written application form, payment of the $10.00 admission fee to the Clerk of the Court, and taking of the prescribed oath." (Emphasis added.)

The local rules, of course, permit counsel not admitted to practice before the court to appear in a particular case if local counsel is associated.

Appellant relies on Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, in which the Court invalidated a one-year residency requirement for eligibility for welfare benefits because it violated the recipient's right to travel. Mr. Deason maintains that the Court rule must be supported by some compelling governmental interest. The Court in Shapiro reserved this issue in footnote 21, page 638, 89 S.Ct. page 133:

"We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." (Emphasis added.)

In Aronson v. Ambrose, 479 F.2d 75 (3d Cir.), a suit was brought by Pennsylvania attorneys under the Civil Rights Act, 42 U.S.C. §1983, claiming a violation of equal protection and right to interstate travel. The attorneys challenged a local rule of the District Court of the Virgin Islands requiring an applicant to allege and prove that if admitted to the bar, he intends to reside, as well as practice, in the Virgin Islands requiring an applicant to allege and prove that if admitted to the bar, he intends to reside, as well as practice, in the Virgin Islands. The court held that the local rule did not deny the attorneys equal protection of the laws nor invade the applicants' constitutional right to engage in interstate travel. The court relied upon Martin v. Walton, 368 U.S. 25,82S.Ct. 1, 7 L.Ed.2d 5, and felt that there was a valid interest in speedy and efficient administration of justice to support such a rule. The appellee urges that the residency requirement is necessary so that the court has the assistance of advocates who are available for court appointments, available for local service, for docket calls, and to prevent delays of motion hearings and matters requiring short notice. Appellee argues that the Supreme Court decided in Martin v. Walton, 368 U.S. 25, 82S.Ct. 1, 7 L.Ed.2d 5, however, the Court reviewed rules promulgated by the Supreme Court of Kansas which denied an attorney the right to appear in a Kansas court without associating local counsel, solely because he had his principal office and practiced regularly in Missouri. The attorney was a resident of Kansas and was duly licensed to practice law in both Kansas and Missouri. He maintained law offices in both states. The Court dismissed the appeal for want of a substantial federal question. We feel that the Martin case is dispositive.

We conclude the rule requiring residency before admission to practice before the United States District Court does not give rise to a substantial federal question. We conclude the order denying admission to practice was proper.

Appellant's other contentions are without merit, and the appeal is dismissed.
(574 F.2d 504)

Supreme Court, U. S.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 14, 1978. The time for filing a petition for a writ of certiorari was not extended and therefore expired on July 13, 1978. 28 U.S.C. 2101(c). The petition was filed on July 14, 1978, and is thus out of time. The time limit of 28 U.S.C. 2101(c) is jurisdictional. See *Toledo Scale Co.* v. *Computing Scale Co.* 261 U.S. 399, 417-418.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

DOJ-1978-08